MOTION FILED DEC 21 1962

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 54

THE WHITE MOTOR COMPANY, *Appellant*,

v.

UNITED STATES, *Appellee*.

On Appeal From the United States District Court for the Northern District of Ohio

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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December 21, 1962

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CASES

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now come Honorbilt Products, Inc. of Philadelphia, Pa., and August Bedding Company of Augusta, Georgia, both of which are small, regionally-based mattress manufacturers, on behalf of themselves and thirty-four other similar small manufacturers

located throughout the United States, and Serta Associates, Inc., and respectfully move this Court, pursuant to Rule 42.3 of the Rules of this Court, for leave to file the accompanying brief in this case *amicus curiae*. Said manufacturers, in order to maintain their independence and wage effective competition with two nation-wide manufacturers that dominate the mattress industry, have for many years been using the common trademark, "Serta". This mark is owned and licensed to them by movant, Serta Associates, Inc., which is wholly owned by its licensees. The interest of movants and their reasons for asking leave to file a brief *amicus curiae* are set forth below.

The need for movants' joint use of a common mark arises from their individual financial inability, being small businesses, to defray the cost of the expensive national magazine, television and radio advertising and promotion that must be undertaken if they are to compete successfully, and the consequent necessity to pool their limited financial resources. As an essential element of their cooperative advertising program, each licensee is granted the right to sell mattresses bearing the common trademark exclusively within a specified area. This allocation of territory is essential to movants' competitive survival. Most of the licensees have been doing business in their respective areas for thirty years or more.

The antitrust validity of such exclusive territorial allocations has been upheld by the Court of Appeals for the Fifth Circuit, in a recent case involving another cooperative trademark licensing group in the mattress industry, *Denison Mattress Factory* v. *The Spring-Air Company*, 308 F. 2d 403. The Department of Justice, however, is currently urging, in a civil anti-

trust proceeding against Serta Associates, Inc. in the District Court in Chicago, that, no matter how small the percentage of the industry involved, the mere existence of territorial allocations with respect to a single trademarked brand of mattress is illegal *per se*, and that Serta Associates, Inc. is foreclosed from presenting evidence showing that the allocations promote competition, are necessary to curb monopoly in the industry and are reasonably ancillary to a valid trademark license.

The territorial allocation involved in this appeal is described by the government as a vertical one, imposed by the manufacturer on its distributors, while the allocation involved in the Chicago proceeding against movant is described by the government as horizontal in nature. The government, however, in its argument in this appeal that vertical allocations are *per se* illegal, is taking the position that all territorial allocations, horizontal or vertical, are illegal, and is citing (without analyzing) precedents involving horizontal allocations. Appellant, which is understandably concerned only with supporting its vertical allocations, is apparently conceding, without analysis of the problem, the illegality of *all* horizontal territorial allocation agreements. Movants, therefore, are satisfied that neither party to the appeal will present the facts or raise the legal questions relevant to the antitrust validity of horizontal territorial allocations, and that the Court's opinion in this appeal may affect the District Court's disposition of the Chicago proceeding against movant.

The purpose of the accompanying brief is, therefore, to aid the Court in the disposition of this appeal:—

(a) By analyzing the relevant legal precedents dealing with horizontal territorial allocations; and

(b) By presenting to the Court the basic facts pertaining to the movants, so that the Court's opinion on this appeal will not inadvertently apply to facts which differ from those in the record presently before it.

The delay in filing this motion is due to the fact that the Justice Department's position with respect to horizontal territorial allocations was not clear to movants until their receipt of a copy of the Department's brief, which took place on December 14, 1962.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF SERTA ASSOCIATES, INC., HONORBILT PRODUCTS, INC., AUGUSTA BEDDING COMPANY AND THIRTY-FOUR OTHER LICENSEES OF SERTA ASSOCIATES, INC.

This brief *amicus* is presented on behalf of Serta Associates, Inc. and its licensees, some thirty-six small, regionally-based United States mattress manufacturers, which sell their products primarily to department and household furnishing stores and not directly to retail consumers. The thirty-six licensees manufacture mattresses under the common trademark, "Serta", which is licensed to them by Serta Associates,

Inc., all the shares in which are owned by said licensees. A condition of the Serta license is the designation of an exclusive territory outside of which a licensee may not sell its Serta-identified products. The licensees also produce mattresses under their own private trademarks, which are not subject to any contractual restrictions and are not involved in this brief. The number of mattresses that a given licensee manufactures and sells, either under its own private trademark or under the Serta trademark, is left to the licensee's sole discretion.

The purpose of this brief is to demonstrate that a territorial allocation of this kind, based on trademark licenses involving manufacturers with no market power, is not invalid under the Sherman Act.

STATEMENT OF FACTS

The aggregate annual sales volume of Serta-brand mattresses produced by all thirty-six Serta licensees in 1961 was approximately 27 million dollars, which is less than 7 percent of the total annual wholesale sales of the bedding industry of the United States, estimated to be nearly five hundred million dollars a year. The main competitor of the Serta licensees is the Simmons Company, a nation-wide firm with 13 factories, 61 warehouses and a total annual sales volume of one hundred and ten million dollars. Detailed figures are not available as to the annual sales volume of the second largest nationally integrated competitor, the Englander Company, but this is also considerably in excess of the aggregate amount of Serta-brand sales.

The Serta licensees located in Philadelphia, Pa. and Augusta, Ga. have about twenty-five local manufacturing competitors each, and the situation of the other

licensees is essentially the same. Because of this intense local competition, the selling prices of the individual Serta licensees vary considerably, and they have neither the occasion nor the power to fix the price of their products.

The basic trademark licensing agreements described herein were first signed in 1931 as a means of enabling the participating regional licensees to remain in business and compete with the Simmons Company. This corporation had complete national coverage both in manufacturing and warehousing and was able to engage in expensive national advertising. Such advertising coverage was a competitive necessity for the licensees but was not within the financial resources of of the individual small manufacturers. As an alternative means of coping with this problem, a group of manufacturers (which subsequently became the Serta licensees) had, for three years prior to 1931, prepared and discussed plans for a merger. These plans were abandoned, because of the desire of these manufacturers to retain control over their own manufacturing and distributing operations and to maintain their local personalities.

Under the trademark licenses, the licensor, Serta Associates, Inc. (a) engages in research, (b) develops specifications and quality standards for Serta mattresses, (c) subjects the Serta-brand mattresses to quality control and inspection procedures necessary to the validity of the licenses and the preservation of the trademark and (d) develops and engages in national advertising campaigns, both in national magazines and on radio and TV, and other promotional programs. The Serta licensees contribute funds to Serta Associates, Inc. to support these activities, and also

use their own funds for local advertising of Serta-brand mattresses. Even more than it was in 1931, it is now essential for competitive survival for the Serta licensees to exploit a common trademark by using expensive mass communications media, which they could not afford to do individually. For the same reason, since the initiation of the Serta trademark licensing program, five other similar trademark licensing groups have been formed in the mattress industry.

Most of Serta licensees have been in business in their respective areas for decades and some for three generations. During that period, they have generated considerable good will with their retail outlets. The purpose of the Serta licensees in making financial contributions for the promotion of the Serta trademark, both locally and nationally through Serta Associates, Inc., was to build further on this good will, by reaching retail consumers in their areas who can only be reached through national advertising of a well known brand name. To avoid having this good will dissipated and to assure to the licensees that they will obtain the fruits of their financial investment in developing the common mark, the trademark license from Serta Associates, Inc. to each individual licensee grants exclusive rights in the defined geographic area that had theretofore been effectively served by the licensee. If the licensees were not thus assured of an exclusive territory, they would have no incentive for cooperating in the advertising and promotion of a common trademark. Without such cooperation, the economic consequences to the individual licensees would be sale, merger, or gradual loss of business and subsequent liquidation.

The validity under the Sherman Act of territorial allocations as described above has been upheld by the Court of Appeals for the Fifth Circuit in a recent case involving a similar cooperative licensing group in the mattress industry, *Denison Mattress Factory v. The Spring-Air Company*, 308 F. 2d 403. The validity of this kind of territorial allocation has been attacked, however, by the Justice Department in a civil antitrust proceeding in the District Court in Chicago, Illinois, brought against Serta Associates, Inc. The government's complaint alleges that the Serta licensees have combined to fix the *resale* prices of their customers (an allegation denied by the defendant) but, as on this appeal, the government argues that the territorial allocation is *per se* and independently illegal. The government's complaint does not allege that the Serta licensees have conspired to fix their own selling prices, which, as pointed out earlier, they do not have the market power to do (see pp. 6-7, *supra*).

Amici's arrangements, as viewed by the Justice Department, are in the nature of horizontal territorial allocations. Although the record on this appeal involves vertical territorial allocations, the Justice Department is relying on precedents involving horizontal allocations and taking the position that all such allocations are invalid. Appellant, concerned only with its vertical allocation arrangements, is conceding, without analysis, the invalidity of all horizontal allocations. *Amici* are therefore apprehensive that this Court, on a record not involving horizontal territorial allocations, may in its opinion give some indication that all horizontal territorial allocations are invalid, and thereby negative the contrary view of the Fifth Circuit and prejudice *amici* in the Chicago antitrust proceeding described in the preceding paragraph.

ARGUMENT

An Exclusive Territorial Allocation Agreement Among Potential Competitors Which Promotes Competition or is Ancillary to a Lawful Main Purpose Does Not Violate the Sherman Act

The basic substantive position of the Department of Justice is that any territorial allocation agreement involving potential competitors, even if it covers only a small percentage of the relevant market, is *per se* illegal and admits ot no substantive defenses. The procedural corollary of this position is that a defendant is foreclosed from introducing evidence to prove that the territorial allocation promotes, rather than restrains, competition in the market place, or that the allocation is reasonably ancillary to a lawful main purpose. In practical effect, the Department contends that, once the mere existence of any territorial allocation is established by contract, the plaintiff is automatically entitled to a summary judgment against the parties to the contract.

The Department further contends that its position is supported by the opinion of this Court in *Northern Pacific Co.* v. *United States*, 356 U.S. 1. We do not agree. Thus, we agree that:—"There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Co.* v. *United States*, at p. 5. We also agree that, *once* the restrictive effect of such an agreement on competition is established, there is no "necessity for any incredibly complicated and prolonged economic investigation into the entire his-

tory of the industry involved, as well as related industries, in an effort to determine at large whether the particular restraint is unreasonable" (*ibid*). But to go further, as the Department contends, and to foreclose a defendant from producing evidence that a territorial allocation does not restrain competition in the relevant market but is, in fact, necessary to counteract monopolistic tendencies in the industry, is to convert a rule of judicial administrative convenience into an instrument for promoting monopoly contrary to the policy of the Sherman Act. This contention finds no support in the relevant precedents.

The Department's position would involve reading into the antitrust laws economic theories favoring, rather than discouraging, monopoly, cf. the separate opinion of Mr. Justice Douglas in *Standard Oil Co.* v. *United States,* 337 U.S. 293, 315. It is at odds with the legislative purpose of the Sherman Act, which was

> "* * * directed to control of the market by *suppression of competition* in the marketing of goods and services, *the monopolistic tendency of which had become a matter of public concern.* The end sought was the prevention of restraints to free competition in business and commercial transactions *which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services*, all of which had come to be regarded as a special form of public injury." *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 493. (Italics supplied).

The starting point for analysis, and the sole precedent on division of markets cited in the *Northern Pacific* case, is *United States* v. *Addyston Pipe and*

Steel Co., 85 Fed. 271 (C.C.A. 6), aff'd 175 U.S. 211. The defendants in this case were a combination producing two-thirds of the output of cast-iron pipe in an area covering three-fourths of the United States. By virtue of their market control, their collusive rotation of bids and the freight that had to be paid by competing Eastern manufacturers, the défendants

> "were practically able to fix prices [and] to compel the public to pay an increase over what the price would have been, if fixed by competition between defendants, nearly equal to the advantage in freight rates enjoyed by defendants over Eastern competitors." (85 Fed., at 292).

Such a practical elimination of price competition within substantial parts of the United States was the determinative factor in the court's conclusion that the Sherman Act had been violated. See *Addyston Pipe and Steel Co.* v. *United States*, 175 U.S., at 236; *Apex Hosiery Co.* v. *Leader*, 310 U.S., at 495, fn. 16. This is a far cry from our situation, where the manufacturer of a Serta-brand mattress in Philadelphia or Augusta, Ga., has twenty-five competitors in its own area, and is not able to fix prices but has its own prices determined by the interplay of competitive forces.

The Court in *Addyston Pipe and Steel* stated that the public policy of the common law and of the Sherman Act prohibiting restraints of trade was based on two primary considerations, which it then showed at length to be basic to the cases holding restraints of trade invalid:—

> "4. They [restraints of trade] prevent competition and enhance prices. 5. They expose the public to all the evils of monopoly; and this especially is applicable to wealthy companies and large cor-

> porations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market. Against evils like these, wise laws protect individuals and the public by declaring all such contracts void." (85 Fed., at p. 280, quoting with approval *Alger* v. *Thacher,* 19 Pick. 51, 54).

The territorial allocations described in our Statement of Facts, which involve small businesses, promote competition both nationally and in local markets, have no effect on prices and protect the public from monopolistic tendencies that would otherwise encompass their industry, are not proscribed by this public policy.

The defendants in the *Addyston* case did not deny that the purpose of their agreements was to fix prices and to restrain competition, but pleaded the reasonableness of the prices fixed by them and the necessity of combining in order to avoid ruinous competition. The Court (which did not agree with this justification of defendants) held independently:

> "* * * that the association of the defendants, however reasonable the prices they fixed, however, great the competition they had to encounter and however great the necessity for curbing themselves by joint agreement from commiting financial suicide by ill-advised competition, was void at common law, because in restraint of trade, and tending to a monopoly." (Ibid, p. 291).

Nowhere, however, is there any suggestion that antitrust defendants are foreclosed from pleading and proving (as is true of the *amici* herein) that they had no power to fix prices; that they were not eliminating outside competition; and that their actions tended not towards monopoly but towards its prevention.

The Court in *Addyston Pipe and Steel* clearly opposed the view

> "* * * that contracts made with a view to check such ruinous competition and regulate prices, though in restraint of trade, *and having no other purpose*, will be upheld." (Ibid, p. 283; italics supplied).

It said that the cases

> "* * * do not manifest any general disposition on the part of the courts to be more liberal in supporting contracts *having for their sole object the restraint of trade* than did the courts of an earlier time." (Ibid, p. 283; italics supplied).

It was in this context that the Court laid down, in no uncertain terms, the doctrine of reasonable ancillary restraints, i.e., that a trade restraint is enforceable if

> "* * * the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party." (Ibid, p. 282).

The territorial allocations obtaining among the Serta licensees are ancillary to their lawful (and economically necessary) "main purpose" to contract for the co-operative promotion of their trademarks and their national advertising, and are needed to protect the participating licensee "in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use by the other party."

To rephrase the doctrine of the *Addyston* case in the language employed by this Court in *Northern Pacific Co.* v. *United States* (see pp. 10-11, above):—

Once the plaintiff has established the "pernicious effect" of a territorial allocation agreement on competition in the relevant market, and the defendants have failed to establish, as a "redeeming virtue" of such an agreement, that it was ancillary to a lawful main purpose, the allocations "are conclusively presumed to be unreasonable and therefore illegal without inquiry as to the precise harm they have caused or the business excuse for their use." But the *per se* rule of antitrust illegality does not deprive defendants of the right to introduce evidence that the allocations do not restrict competition in the relevant market and are incidental to a lawful and competitively-oriented contract.

The above interpretation is consistent with the *Apex Hosiery* case where, in two exhaustive footnotes dealing with the legislative history and the judicial application of the Sherman Act, this Court concluded that the Act was designed to deal with restraints of trade which had a "significant" or "substantial" effect on "business competition," and that the emphasis of the cases was on "competitive conditions in the industry." 310 U.S. at pp. 493 to 496, footnotes 15, 16. The general rule set forth in the preceding paragraph applies to territorial allocations, price-fixing and the other categories of *per se* violation referred to in the *Northern Pacific* dictum. It does not exclude the possibility that a practice such as price-fixing may have such an inherently adverse or pernicious effect on competition as to reduce to the vanishing point the possibility that it might have any "redeeming virtue" or competitive justification. However, the legal precedents discussed in this brief, and the Statement of Facts herein, demonstrate the divergent impacts of territorial allocation and of price-fixing on competition, and the economic

and logical fallacy of regarding the cases in the one area as dispositive of the cases in the other. We urge that a practice such as territorial allocation, which in certain cases is essential to the survival of a competitive industry, be adjudged on its own merits, and not by way of presumed analogy to price-fixing agreements, which play a different role in the economy and for which it may well be impossible to advance any competitive defense.

Other territorial allocation cases that have been reviewed by this Court confirm the above views. Thus, *United States* v. *National Lead Co.*, 63 F. Supp. 513 (S.D. N.Y.), aff'd, 332 U.S. 319, involved dominant producers covering the entire titanium pigments industry, who agreed to divide world markets on a mutually exclusive basis. As the District Court said:—

> "When the story is seen as a whole, there is no blinking the fact that there is no free commerce in titanium. Every pound of it is trammelled by privately imposed regulation." (63 F. Supp. at 520).

Specifically analyzing the agreements and evidence presented to it, the court repeatedly found that the paramount purpose of the agreements and the combination of the parties was to suppress and avoid competition, and rejected defendants' arguments that the restraints in question were reasonably ancillary to a lawful main purpose (*ibid*, pp. 518-9, 522-4). Having made these basic findings, the court summarily disposed of defendants' arguments of reasonableness and business necessity, i.e., that the restrictive arrangements had benefited the public and that American producers could not compete in a cartelized world except on cartelized terms (*ibid*, pp. 525-6).

Similarly, in *United States* v. *Timken Roller Bearing Co.*, 83 F. Supp. 284 (N.D. Ohio), aff'd, 341 U.S. 593, the defendant, which had entered into territorially exclusive agreements with the largest English and French producers of tapered roller bearings, was

> "* * * an American corporation, dominant in the field of tapered roller bearings, producing between 70 and 80 percent of the American output. In 1947 it did over $77,000,000 gross sales." (Concurring opinion of Mr. Justice Reed, 341 U.S. at 603; see also 83 F. Supp. 288-9, 291-2).

This Court endorsed the District Court's finding, based on an exhaustive review of the evidence, that the purpose and effect of defendant's restrictive agreements "* * * was to avoid all competition either among themselves or with others" (*ibid*, at pp. 597-8; see also 83 F. Supp. at 306-7). Both the District Court and this Court rejected, *but* the District Court considered at length, the evidence supporting defendant's arguments that "* * * the trade restraints were merely incidental to an otherwise legitimate 'joint venture'" and were "* * * reasonable steps taken to implement a valid trademark licensing system" (*ibid*; see also 83 F. Supp. at 310-6, 316). Having done this, both courts rejected arguments that what the defendant had done was reasonable in the light of foreign trade conditions (*ibid*, 599; see also 83 F. Supp. at 316-8).

Neither *National Lead* nor *Timken* contains any indication that the plaintiff in a territorial allocation case is relieved from establishing the adverse impact of the allocation on competition in the market place, or that a defendant may not try to prove the negative of that proposition or the existence of a valid main purpose to which the allocation was incidental. If

such antitrust safeguards exist when the defendants dominate their respective industries, they apply with even increased force to small businesses, possessing no market power, whose reservation of exclusive areas is an integral part of a legitimate main purpose and program to compete with and curb the rise of monopoly in their industry.

CONCLUSION

The Court's disposition of the pending appeal does not require a determination that all horizontal territorial allocations are invalid.

Respectfully submitted,

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